

# Selected Church-State Issues in Elementary and Secondary Education

October 1, 2010

Congressional Research Service

<https://crsreports.congress.gov>

R41445

## Summary

The Elementary and Secondary Education Act (ESEA) contains a number of separately authorized programs, which generally distribute funds by formulas that prescribe how funds are to be allocated among state educational agencies (SEAs) or local educational agencies (LEAs) nationwide. The ESEA raises a number of legal issues, particularly relating to the First Amendment, regarding state assistance or involvement in issues of religion or religious schools. As Congress considers whether to reauthorize the ESEA, it may be interested in the state of the law with respect to church-state issues in education. This report will highlight the legal and policy issues that arise in the context of elementary and secondary education programs. In particular, it will address a variety of contexts in which First Amendment concerns may be raised in education-related legislation, including teaching of creationism, school prayer, civil rights protections in schools, funding for faith-based organizations (FBOs) and school vouchers, supplemental services, and Title I reimbursement for religious schools.

Several points of the analysis provided by this report stem from concerns that government assistance for religious schools or religious purposes in public schools is improper, or that government involvement in particular issues may be construed as support for a religious purpose. These issues are generally governed by the Establishment Clause of the First Amendment, which provides that “Congress shall make no law respecting an establishment of religion...” The U.S. Supreme Court has addressed a number of First Amendment issues arising in the education context, as discussed in this report. These cases indicate a general rule that the First Amendment prohibits a state from utilizing “its public school system to aid any or all religious faiths or sects in the dissemination of their doctrines and ideals.”

This report focuses on the Supreme Court’s decisions regarding the range of topics that involve religious concerns in education. The first sections of the report address issues arising from the constitutionally permissible role of religious activity in public schools, including whether governments may impose curriculum restrictions with religious implications and whether any or all forms of prayer and religious activity in schools may be prohibited. The report then examines the legal implications of government aid to religious schools, including both aid provided directly to the schools and indirect payments such as school vouchers, including a discussion of the District of Columbia Opportunity Scholarship program. This is currently the only federally funded elementary and secondary education voucher program that provides funds for students to attend private schools, including religiously affiliated schools. The last sections of the report focus on the involvement of private schools, including religiously affiliated schools, and FBOs in current elementary and secondary education programs. The first of these sections includes a discussion of provisions governing the equitable participation of private school students in programs authorized by the Elementary and Secondary Education Act (ESEA), most recently amended by the No Child Left Behind Act of 2001 (NCLB; P.L. 107-110). This is followed by an examination of FBOs’ ability to serve as supplemental educational service (SES) providers for schools that have been identified for school improvement under Title I-A of the ESEA.

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The Elementary and Secondary Education Act (ESEA) contains a number of separately authorized programs, which generally distribute funds by formulas that prescribe how funds are to be allocated among state educational agencies (SEAs) or local educational agencies (LEAs) nationwide. The ESEA raises a number of legal issues, particularly relating to the First Amendment, regarding state assistance or involvement in issues of religion or religious schools. As Congress considers whether to reauthorize the ESEA, it may be concerned with the current First Amendment rules with respect to church-state issues in education.

Several points of the analysis that follow stem from concerns that government assistance is improper for private religious schools, or that government involvement in particular issues may be construed as support for a religious purpose. These issues generally are governed by the Establishment Clause of the First Amendment, which provides that “Congress shall make no law respecting an establishment of religion....”<sup>1</sup> The Supreme Court has addressed a number of First Amendment issues arising in the education context, as discussed below. These cases indicate a general rule that the First Amendment prohibits a state from utilizing “its public school system to aid any or all religious faiths or sects in the dissemination of their doctrines and ideals.”<sup>2</sup>

This report will highlight the legal and policy issues that arise in the context of elementary and secondary education programs. In particular, it will address a variety of topics in which First Amendment concerns may be raised in education-related legislation, including teaching of creationism, school prayer, civil rights protections in schools, funding for faith-based organizations (FBOs) and school vouchers, supplemental services, and Title I reimbursement for religious schools.

## Curriculum Restrictions

One of the controversial church-state issues in educational contexts in recent years has been the permissible restrictions that may be placed on curriculum in schools. The Establishment Clause requires that the government remain neutral in matters related to religion and not endorse one particular religion over another, or endorse religion generally.<sup>3</sup> This rule extends to curriculum decisions made for public schools. The issue of curriculum restrictions is highlighted in debates regarding creationism, evolution, and intelligent design in science curricula and has been a source of debate for decades.

In 1968, the U.S. Supreme Court considered whether the First Amendment permitted schools to place limitations on teaching evolution in public school curriculum. In that case, *Epperson v. Arkansas*, a public high school teacher challenged a state statute that prohibited the state’s public schools and universities from teaching evolution theory—“that mankind ascended or descended from a lower order of animals.”<sup>4</sup> The Court relied on what has become one of its central rules of Establishment Clause jurisprudence—that “the First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.”<sup>5</sup> Although the Court noted that the operations of public schools were generally left to state and local governments, they nevertheless were subject to constitutional limitations, including the First

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<sup>1</sup> U.S. Const. amend. I. For a legal overview of the First Amendment, see CRS Report RS22833, *The Law of Church and State: General Principles and Current Interpretations*.

<sup>2</sup> *McCullum v. Bd. of Education*, 333 U.S. 203, 211 (1948).

<sup>3</sup> See *Epperson v. Arkansas*, 393 U.S. 97 (1968); *Lynch v. Donnelly*, 465 U.S. 668 (1984) (O’Connor, J., concurring).

<sup>4</sup> 393 U.S. 97, 98-99 (1968).

<sup>5</sup> *Id.* at 104.

Amendment.<sup>6</sup> Because the Court found that Arkansas' motivation in enacting the challenged statute was "to suppress the teaching of a theory which, it was thought, 'denied' the divine creation of man," it held that the statute violated the requirement of neutrality.<sup>7</sup> According to the Court, "Arkansas did not seek to excise from the curricula of its schools and universities all discussion of the origin of man. The law's effort was confined to an attempt to blot out a particular theory because of its supposed conflict with the Biblical account, literally read."<sup>8</sup>

Two decades after the Court held that schools could not ban the teaching of evolution, it considered whether a school in turn could mandate that "creation science" be taught in addition to evolution. In *Edwards v. Aguillard*, the challenged Louisiana statute prohibited "the teaching of the theory of evolution in public schools unless accompanied by instruction in 'creation science.'"<sup>9</sup> The Court relied on its *Lemon* test, which requires that a law (1) must have a secular purpose; (2) must have an effect that neither advances nor inhibits religion; and (3) cannot cause excessive entanglement of government and religion.<sup>10</sup> According to the Court, the statute violated the first prong of that test, noting that, although the stated purpose was to protect academic freedom, the legislative history indicated an intent to ensure that if evolution was taught, so would creationism. The Court was critical of the statute's stated purpose, explaining that the statute did not allow teachers freedom to determine the curriculum or provide a more comprehensive curriculum. Rather, the Court found its usual deference to the stated purpose was not warranted because that deference required "that the statement of such purpose be sincere and not a sham."<sup>11</sup> The Court concluded that "in this case, the purpose of the Creationism Act was to restructure the science curriculum to conform with a particular religious viewpoint," which violated the First Amendment.<sup>12</sup>

The debate over curriculum restrictions has continued over the years. As recently as 2005, a federal district court held that a Pennsylvania school district policy that mandated teaching "intelligent design" as an alternative explanation to the theory of evolution violated the First Amendment.<sup>13</sup> The court found that the policy communicated a message of endorsement of a particular religious belief in violation of the Establishment Clause because, according to the court, the theory of intelligent design was an outgrowth of creationism and was not science.<sup>14</sup> The court explained that the school district implemented the policy to advance religion, relying on the policy's plain language, its legislative history, and the historical context of intelligent design.<sup>15</sup>

As mentioned earlier, curriculum decisions are typically within the purview of state and local governing bodies, not Congress. However, in the congressional debate over reauthorization of ESEA in 2001, the Senate passed what is often referred to as the Santorum Amendment, which stated that:

It is the sense of the Senate that—

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<sup>6</sup> *Id.* at 104-07.

<sup>7</sup> *Id.* at 108.

<sup>8</sup> *Id.* at 109.

<sup>9</sup> 482 U.S. 578, 580 (1987).

<sup>10</sup> See *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

<sup>11</sup> *Edwards*, 482 U.S. at 586-87.

<sup>12</sup> *Id.* at 593.

<sup>13</sup> *Kitzmiller v. Dover Area School District*, 400 F. Supp. 2d 707, 708 (2005).

<sup>14</sup> *Id.* at 716, 746.

<sup>15</sup> *Id.* at 747.

(1) good science education should prepare students to distinguish the data or testable theories of science from philosophical or religious claims that are made in the name of science; and

(2) where biological evolution is taught, the curriculum should help students to understand why this subject generates so much continuing controversy, and should prepare the students to be informed participants in public discussions regarding the subject.<sup>16</sup>

Worded generally to express the Senate's policy perspective, the amendment did not introduce any requirements for curriculum choices in schools. As such, it does not have a binding effect on school curricula.

## Prayer in Schools

Constitutional rules governing prayer in public schools vary depending upon the context of the particular religious expression at issue. Generally, schools, administrators, and teachers may not require or lead students in religious activities, but students may engage in private religious observances while in school. That is, the Court has made explicit a constitutional distinction between the sponsorship of religious activities in the schools by government and the conduct of such activities by students on their own initiative.<sup>17</sup> Accordingly, the Court has imposed restrictions on school prayer, but it has also found broad constitutional protection for private religious expression in decisions concerning moments of silence and equal access policies for student religious groups at the secondary school level.

## Government Sponsored Religious Activities

The Supreme Court has held that “the constitutional prohibition against laws respecting an establishment of religion must at least mean that in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government.”<sup>18</sup> In doing so, the Court held that the government, including public schools, could not mandate school prayer, even if it was brief and nondenominational as was required by the challenged state statute.<sup>19</sup> Likewise, the Court has prohibited Bible readings as part of the official school day.<sup>20</sup>

Although the Court made clear early on that state sponsorship of regular devotional activities such as prayer and Bible reading violated the Establishment Clause, the accommodation of voluntary prayer does not pose as clear a violation. As discussed later in this report, voluntary prayer may be constitutionally protected; however, if a school sets aside time that may be used for voluntary prayer, the Court has required that such a policy must have a legitimate legislative purpose. When considering an Alabama statute mandating a daily moment of silence in public schools for purposes of “meditation or voluntary prayer,” the Court found that the statute was enacted “for the sole purpose of expressing the State’s endorsement of prayer activities.”<sup>21</sup>

Another statute, previously adopted by Alabama, already provided for a moment of silence at the

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<sup>16</sup> S.Amdt. 799, amends S. 1, S.Amdt. 358 (107<sup>th</sup> Cong.) (2001).

<sup>17</sup> See *Santa Fe Indep. School Dist. v. Doe*, 530 U.S. 290, 302 (2000).

<sup>18</sup> *Engel v. Vitale*, 370 U.S. 421, 425 (1962).

<sup>19</sup> *Id.* at 436.

<sup>20</sup> *School District of Abington Twp. v. Schempp*, 374 U.S. 203 (1963).

<sup>21</sup> *Wallace v. Jaffree*, 472 U.S. 38, 60 (1985).

beginning of each school day for purposes of meditation. The legislative history of the addition of the phrase “or voluntary prayer” in the later statute, the Court concluded, clearly showed that the statute was intended to serve no secular purpose and was of a “wholly religious character.”<sup>22</sup> The Court emphasized that it was not holding all moment of silence provisions to be unconstitutional, noting that “the legislative intent to return prayer to the public schools is ... quite different from merely protecting every student’s right to engage in voluntary prayer during an appropriate moment of silence during the schoolday. The [earlier] statute already protected that right.”<sup>23</sup> Thus, it appears likely that statutes or regulations mandating a moment of silence can pass constitutional muster, provided that they are not adopted for the purpose of promoting prayer and are not implemented to give governmental encouragement or preference to prayer.

In prohibiting schools from mandating prayers during the school day, the Court reasoned that because attendance in school was compulsory, students had no means to avoid being exposed to the particular religious observance created by the school policies. Questions later arose as to whether the same constitutional protections would apply to school-run events outside the traditional school day, such as ceremonies and sporting events. The Court has recognized that, although a student is not required to attend the graduation ceremony to receive a diploma, there is significant peer pressure to attend and participate in graduation, which is “one of life’s most significant occasions,” even if it includes a religious prayer to which the student objects.<sup>24</sup> According to the Court, this constitutes a form of coercion to participate in the prayer, which is not permissible under the First Amendment.<sup>25</sup> Thus, the Court held that the school could not invite a religious leader to deliver a prayer at the graduation ceremony. The scope of that ruling was challenged later, as the Court was faced with a policy that permitted high school students to vote on whether to have a student volunteer deliver an invocation before home football games over a public-address system.<sup>26</sup> In that instance, the Court held that the policy was unconstitutional because it inevitably discriminated against minority views and perpetuated a majoritarian viewpoint. Furthermore, given the mode of delivery, the Court found that an objective observer would “unquestionably perceive the inevitable pregame prayer as stamped with [the] school’s seal of approval.”<sup>27</sup>

## **Privately Initiated Religious Activities**

Although the Court has strictly construed the Establishment Clause related to religious activities initiated or led by school officials, it has repeatedly affirmed the constitutionality of private religious expression. According to the Court, “it can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”<sup>28</sup> As discussed earlier, the Court has been careful to note that voluntary prayer by students is not prohibited, but the implementation of moments of voluntary prayer by schools crosses the line of permissibility because the school at least appears to be promoting religious practice.<sup>29</sup>

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<sup>22</sup> *Id.* at 58.

<sup>23</sup> *Id.* at 59.

<sup>24</sup> *Lee v. Weisman*, 505 U.S. 577, 593-95 (1992).

<sup>25</sup> *Id.* at 587.

<sup>26</sup> *Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290 (2000).

<sup>27</sup> *Id.* at 308.

<sup>28</sup> *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

<sup>29</sup> *Wallace*, 472 U.S. at 59.



Another common example of how this issue arises is that of student-initiated religious groups and extracurricular clubs. In 1984, Congress enacted the Equal Access Act, which bars public secondary schools that receive federal assistance and that have a limited open forum from discriminating against any student group seeking to meet on the basis of the content of the speech at such meetings (including religious content).<sup>30</sup> The statute defines *limited open forum* as the “opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time.”<sup>31</sup> The Supreme Court upheld the statute as a remedy against “perceived widespread discrimination against religious speech in public schools” and said it applied any time a school permitted even one noncurriculum related student group to meet.<sup>32</sup> The Court further found that the statute did not promote religion or place the imprimatur of government on the religious speech that would occur at such meetings.<sup>33</sup>

To the extent that individuals wish to exercise individual religious expression in schools, the Court has allowed the activity if implemented in a religiously neutral way and without implication of official sanction. The Court has noted that students’ private religious expression does not become governmental endorsement of religion simply because it occurred during school time.<sup>34</sup> By allowing students their choice of voluntary expression, a school can avoid giving preferential or discriminatory treatment based on the religious nature of that expression and thus comport with the requirements of the First Amendment.

## Funding to Religious Institutions

The U.S. Supreme Court has construed the Establishment Clause, in general, to mean that government is prohibited from sponsoring or financing religious instruction or indoctrination. In the context of public aid to religious schools, the Court has drawn a constitutional distinction between aid that flows directly to sectarian schools and aid that benefits such schools indirectly as the result of voucher or tax benefit programs. It is important to note that these rules have been applied differently in some cases, depending on the nature of the educational institution (i.e., elementary and secondary schools versus colleges and universities).<sup>35</sup>

## Federal Funding for Programs and Materials at Religious Schools

Direct aid challenges often arise in the context of funding or material assistance to programs that benefit religious schools and their students. Often, the Court has made constitutional distinctions based on the purpose of the aid and whether the program receiving assistance was intended for the benefit of all schoolchildren. For example, the Court has held it to be constitutionally permissible for a local government to subsidize bus transportation between home and school for parochial schoolchildren as well as public schoolchildren.<sup>36</sup> The Court said the subsidy was essentially a general welfare program that helped children get from home to school and back safely. On the other hand, the Court held the Establishment Clause to be violated by the public

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<sup>30</sup> 20 U.S.C. § 4071(a).

<sup>31</sup> 20 U.S.C. § 4071(b).

<sup>32</sup> Bd. of Edu. of Westside Cmty. Schools v. Mergens, 496 U.S. 226, 239 (1990).

<sup>33</sup> *Id.* at 247-48.

<sup>34</sup> *Santa Fe*, 530 U.S. at 302.

<sup>35</sup> For an analysis of specific decisions under each of these categories, see CRS Report R40195, *The Law of Church and State: Public Aid to Sectarian Schools*.

<sup>36</sup> *Everson v. Bd. of Education*, 330 U.S. 1 (1947).



subsidy of field trip transportation for parochial schoolchildren on the grounds that field trips are an integral part of the school's curriculum and wholly controlled by the school.<sup>37</sup>

With respect to direct aid, the Court has typically applied the tripartite test it first articulated in *Lemon v. Kurtzman*.<sup>38</sup> The *Lemon* test requires that an aid program (1) serve a secular legislative purpose; (2) have a primary effect that neither advances nor inhibits religion; and (3) not foster an excessive entanglement with religion. Because education is an important state goal, the secular purpose aspect of this test has rarely been a problem for direct aid programs. But prior to the Court's latest decisions, both the primary effect and entanglement prongs were substantial barriers. To avoid a primary effect of advancing religion, the Court required direct aid programs to be limited to secular use and struck them down if they were not so limited.<sup>39</sup> But even if the aid was so limited, the Court often found the primary effect prong violated anyway because it presumed that in pervasively sectarian institutions it was impossible for public aid to be limited to secular use.<sup>40</sup> Alternatively, it often held that direct aid programs benefiting pervasively sectarian institutions were unconstitutional because government had to so closely monitor the institutions' use of the aid to be sure the limitation to secular use was honored; consequently, the need for close monitoring became excessive entanglement with the institutions.<sup>41</sup> These tests were a particular problem for direct aid to sectarian elementary and secondary schools because the Court presumed that such schools were pervasively sectarian.<sup>42</sup>

The Court's decisions in *Agostini v. Felton*<sup>43</sup> and *Mitchell v. Helms*,<sup>44</sup> however, have recast these tests in a manner that has lowered the constitutional barriers to direct aid to sectarian schools. The Court has abandoned the presumption that sectarian elementary and secondary schools are so pervasively sectarian that direct aid either results in the advancement of religion or fosters excessive entanglement. It has also abandoned the assumption that government must engage in an intrusive monitoring of such institutions' use of direct aid. The Court still requires that direct aid serve a secular purpose and not lead to excessive entanglement; however, it has recast the primary effect test to require that the aid be secular in nature, that its distribution be based on religiously neutral criteria, and that it not be used for religious indoctrination.<sup>45</sup> These latest decisions indicate three necessary criteria to include sectarian schools in programs with direct assistance implications: (1) the aid is secular in nature; (2) the aid is distributed according to religiously neutral criteria; and (3) the aid could be limited to secular use within the sectarian schools without any intrusive government monitoring.<sup>46</sup>

## Federal Funding of Private School Vouchers

Over the past several Congresses, many school choice proposals have been introduced and debated, but most have failed to be enacted. The most controversial issue regarding publicly

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<sup>37</sup> *Wolman v. Walter*, 433 U.S. 229 (1977).

<sup>38</sup> 403 U.S. 602 (1971).

<sup>39</sup> *See, e.g., Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973).

<sup>40</sup> *See, e.g., Aguilar v. Felton*, 473 U.S. 402 (1985), overruled by *Agostini v. Felton*, 521 U.S. 203 (1997).

<sup>41</sup> *See, e.g., Wolman v. Walter*, 433 U.S. 229 (1977), overruled by *Mitchell v. Helms*, 530 U.S. 793 (2000).

<sup>42</sup> *Agostini*, 521 U.S. 203; *Mitchell*, 530 U.S. 793.

<sup>43</sup> 521 U.S. 203 (1997).

<sup>44</sup> 530 U.S. 793 (2000).

<sup>45</sup> *See Agostini*, 521 U.S. 203.

<sup>46</sup> *See Mitchell*, 530 U.S. 793.

funded school choice has been the provision of direct or indirect support to enable students to attend private schools, especially religiously affiliated private schools. Concerns about programs that provide public funds for students to enroll in private schools have centered on whether public funds should be used to provide support to private (especially religiously affiliated) schools and whether the existence of public funding for private school choice options effectively improves educational outcomes for participating students.

The Supreme Court has imposed fewer restraints on indirect aid to sectarian schools, such as tax benefits or vouchers, than it has for direct aid programs. The Court still required such aid programs to serve a secular purpose; but it did not apply the secular use and entanglement tests applicable to direct aid. The key constitutional question was whether the initial beneficiaries of the aid (i.e., parents or schoolchildren) had a genuinely independent choice about whether to use the aid for educational services from secular or religious schools.<sup>47</sup> If the universe of choices available was almost entirely religious, the Court held the program unconstitutional because the government, in effect, dictated by the design of the program that a religious option be chosen. However, if religious options did not predominate, the Court held the program constitutional even if parents chose to receive services from pervasively sectarian schools. Moreover, in its decision in *Zelman v. Simmons-Harris*,<sup>48</sup> the Court legitimated an even broader range of indirect aid programs by holding that the evaluation of the universe of choice available to parents is not confined to the private schools at which the voucher aid can be used, but includes as well all of the public school options open to parents.

Nonetheless, objections are still raised regarding the use of public funds to pay tuition at religiously affiliated schools.<sup>49</sup> Less controversial are school choice programs in which funding remains under public control, such as public charter schools and the implementation of school choice provisions under Title I-A of the ESEA.<sup>50</sup>

The District of Columbia Opportunity Scholarship program<sup>51</sup> is an example of a federal program that supports the enrollment of students in private elementary and secondary schools, including religiously affiliated private schools.<sup>52</sup> The DC School Choice Incentive Act (P.L. 108-199, Title III) authorized a scholarship or voucher program to provide the families of low-income students, particularly students attending elementary or secondary schools identified for improvement, corrective action, or restructuring under the ESEA<sup>53</sup> with expanded opportunities to enroll their children in schools of choice located in the District of Columbia. The program was authorized for FY2004 through FY2008. Most recently, through the Consolidated Appropriations Act, 2010 (P.L. 111-117), the program received appropriations to continue to provide vouchers to students who

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<sup>47</sup> See, e.g., *Mueller v. Allen*, 463 U.S. 388 (1983).

<sup>48</sup> 536 U.S. 639 (2002).

<sup>49</sup> For a discussion of church-state constitutional issues regarding vouchers, see CRS Report RL30165, *Education Vouchers: Constitutional Issues and Cases*, by Angie A. Welborn.

<sup>50</sup> For more information about these provisions, see CRS Report RL33371, *K-12 Education: Implementation Status of the No Child Left Behind Act of 2001 (P.L. 107-110)*, coordinated by Gail McCallion.

<sup>51</sup> For more information about this program, see CRS Report R40574, *District of Columbia Opportunity Scholarship Program: Implementation Status and Policy Issues*, by Rebecca R. Skinner and Erin D. Caffrey.

<sup>52</sup> Another example of a federal program that supports the enrollment of students in private schools is the Coverdell Education Savings Account program. For more information, see CRS Report RL32155, *Tax-Favored Higher Education Savings Benefits and Their Relationship to Traditional Federal Student Aid*, by Linda Levine, or CRS Report RL31439, *Federal Tax Benefits for Families' K-12 Education Expenses in the Context of School Choice*, by Linda Levine and David P. Smole.

<sup>53</sup> For more information about school improvement requirements under the ESEA, see CRS Report RL33371, *K-12 Education: Implementation Status of the No Child Left Behind Act of 2001 (P.L. 107-110)*, coordinated by Gail McCallion.

were enrolled in the program during the 2009-2010 school year. The program is not accepting new applicants.

In general, private schools, including religiously affiliated schools, accepting scholarships through the Opportunity Scholarship program are prohibited from discriminating against program participants or applicants on the basis of race, color, national origin, religion, or gender. The last prohibition does not apply, however, to single sex schools that are operated by, supervised by, controlled by, or connected to a religious organization to the extent that nondiscrimination based on gender would be inconsistent with the religious beliefs of the school. In addition, nothing in the School Choice Incentive Act allows participating schools to alter or modify the provisions of the Individuals with Disabilities Education Act (IDEA). With respect to sectarian private schools that accept scholarship students, nothing in the School Choice Incentive Act prohibits the school from hiring in a manner consistent with the school's religious beliefs or requires the school to alter its mission or remove religious symbols from its building. All participating private schools are required to comply with requests for data and information with respect to program evaluations required by the School Choice Incentive Act.

The Omnibus Appropriations Act, 2009 (P.L. 111-8) added additional requirements for participating schools. First, the participating school must have and maintain a valid certificate of occupancy issued by the District of Columbia. Second, the core subject matter teachers of the scholarship recipient must hold four-year bachelor's degrees.<sup>54</sup>

P.L. 111-117 also added additional requirements for participating schools. Participating schools must be in compliance with accreditation and other standards under the District of Columbia compulsory school attendance laws that apply to educational institutions that are not affiliated with the District of Columbia Public Schools (DCPS). In addition, the Secretary of Education was required to submit a report to Congress by June 15, 2010, that provided information on the academic rigor and quality of each participating school.<sup>55</sup> To obtain comparable data for the report, the Secretary was required to ensure that all voucher recipients participated in the same academic performance assessments as students enrolled in DCPS during the 2009-2010 school year. The Secretary must also ensure that at least two site inspections are conducted at each participating school on an annual basis.

## **Civil Rights Protections Related to Religion in Schools**

Congress has provided several statutory protections to prevent discrimination based on religion in the education context. Some protections apply specifically to educational programs, while others apply more generally. For example, the No Child Left Behind Act of 2001 specifically provided that nothing in the Elementary and Secondary Education Act shall be construed to permit discrimination based on religion.<sup>56</sup> The civil rights provision in that act did not provide any

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<sup>54</sup> Issues related to certificate of occupancy and teachers holding a bachelor's degree were mentioned in GAO's report on the implementation of the DC Opportunity Scholarship Program. For more information, see U.S. Government Accountability Office, *District of Columbia Opportunity Scholarship Program*, GAO-08-9, November 2007, pp. 1-98, <http://www.gao.gov/new.items/d089.pdf>.

<sup>55</sup> It does not appear that this report has been submitted to Congress. It should be noted, however, that initial academic assessment results for the District of Columbia were made available to schools in July 2010 and were not made publicly available until August 2010.

<sup>56</sup> 20 U.S.C. § 7914.

specific guidance on implementation or the scope of protection, but rather indicated a rule of construction for challenges of discriminatory practices that may be raised in the various programs authorized under ESEA.

Civil rights protections for religious schools and teachers may be better understood through the broadly applicable nondiscrimination protections in the Civil Rights Act of 1964.<sup>57</sup> Title VII of the Civil Rights Act of 1964 generally prohibits employers from discriminating against employees on the basis of religion. Specifically, Title VII prohibits employers from using religion as a basis for hiring or discharging any individual. It further prohibits employers from discriminating “with respect to his compensation, terms, conditions, or privileges of employment” because of the individual’s religion.<sup>58</sup> Religious organizations (including educational institutions), however, may be exempt from some of the prohibitions of Title VII.

Title VII’s prohibition against religious discrimination does not apply to “a religious corporation, association, educational institution, or society with respect to the employment [i.e., hiring and retention] of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.”<sup>59</sup> Another exemption applies specifically to religious educational institutions. That exemption allows such institutions “to hire and employ employees of a particular religion if [the institution] is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular [organization], or if the curriculum of [the institution] is directed toward the propagation of a particular religion.”<sup>60</sup> Courts have held that these exemptions protect religious schools’ ability to maintain hiring preferences for individuals with the same religious beliefs.<sup>61</sup>

Exemptions for religious organizations in the context of Title VII are not absolute. Once an organization qualifies as an entity eligible for Title VII exemption, it is permitted to discriminate on the basis of religion in its employment decisions. The exemption does not allow qualifying organizations to discriminate on any other basis forbidden by Title VII. Thus, although a religious organization may consider an employee or applicant’s religion without violating Title VII, the organization may still violate Title VII if it considers the individual’s race, color, national origin, or sex.<sup>62</sup> In some cases, an employer may claim that it had a valid discriminatory reason for the discharge based on religion under the Title VII exemption, while the employee claims the discharge is based on some other Title VII prohibition and therefore improper. For example, in several cases, employees of private religious schools have been discharged after becoming pregnant. In one of these cases, the employer claimed that the termination was based on a violation of an organization policy against extra-marital sex, stemming from the religion’s teachings. The employee claimed that the action was unlawful sex discrimination based on her pregnancy. If the court determines that the employer’s action was taken in response to the

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<sup>57</sup> For a complete legal analysis of Title VII, see CRS Report RS22745, *Religion and the Workplace: Legal Analysis of Title VII of the Civil Rights Act of 1964 as It Applies to Religion and Religious Organizations*, by Cynthia Brougher.

<sup>58</sup> 42 U.S.C. § 2000e-2(a)(1).

<sup>59</sup> 42 U.S.C. § 2000e-1(a). The U.S. Supreme Court unanimously upheld this exemption, allowing a religiously affiliated, non-profit entity to make employment decisions based on religion, even if the position related to non-religious activity of the organization. See *Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987). Faith-based service providers are also eligible for the exemption, but if they receive government funding, the funds cannot be used to directly advance the organization’s religious practices. See *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

<sup>60</sup> 42 U.S.C. § 2000e-2(e)(2).

<sup>61</sup> See, e.g., *Little v. Wuerl*, 929 F.2d 944 (3<sup>rd</sup> Cir. 1991).

<sup>62</sup> See *EEOC v. Pacific Press Publ’g. Ass’n*, 676 F.2d 1272, 1276 (9<sup>th</sup> Cir. 1982); EEOC Notice, N-915, September 23, 1987.

resulting pregnancy, rather than because of a violation of the faith-based policy, the organization may be held in violation of Title VII's prohibition on sex discrimination. In such cases, if the court determines the discharge was based on religious teachings, the organization can claim Title VII exemption.<sup>63</sup>

Furthermore, the exemptions in Title VII appear to apply only with respect to employment decisions regarding hiring and firing of employees based on religion. Once an organization makes a decision to employ an individual, the organization may not discriminate on the basis of religion regarding the terms and conditions of employment, including compensation, benefits, privileges, etc. In other words, religious organizations that decide to hire individuals with other religious beliefs cannot later choose to discriminate against those individuals with regard to wages or other benefits that the organization provides to employees.<sup>64</sup>

## Private School Student Participation in ESEA Programs

Under the Elementary and Secondary Education Act, services are provided to private school students according to the "child benefit" model. Accordingly, children enrolled in private schools may benefit from publicly funded services, yet funding for and the provision of these services remain under public control. That is, the funds are not provided directly to private schools. Children enrolled in private elementary and secondary schools have been eligible to be served under the ESEA in some capacity since its inception in 1965.<sup>65</sup>

Private school students<sup>66</sup> are eligible to be served under the following ESEA programs:

- Title I-A (Education for the Disadvantaged),
- Title I-B-1 (Reading First),
- Title I-B-3 (Even Start Family Literacy),
- Title I-C (Migrant Education),
- Title II-A (Teacher and Principal Training and Recruiting Fund),<sup>67</sup>
- Title II-B (Mathematics and Science Partnerships),
- Title II-D (Enhancing Education Through Technology),
- Title III-A (English Language Acquisition, Language Enhancement and Academic Achievement),
- Title IV-A (Safe and Drug-Free Schools and Communities),
- Title IV-B (21<sup>st</sup> Century Community Learning Centers),

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<sup>63</sup> See *Boyd v. Harding Academy of Memphis, Inc.*, 88 F.3d 410 (6<sup>th</sup> Cir. 1996).

<sup>64</sup> EEOC Notice, N-915, September 23, 1987.

<sup>65</sup> P.L. 89-10, § 205(a)(2).

<sup>66</sup> If home schools are considered private schools under state law, home-schooled students are eligible to receive benefits and services provided to private school students.

<sup>67</sup> The equitable participation requirements apply to the extent that LEAs use funds for professional development. In determining how much funding an LEA must make available for equitable services for private school teachers and staff, the LEA must spend at least as much on professional development under Title II-A as it did in FY2001 under the former Eisenhower Professional Development and Class-Size Reduction programs.



- Title V-A (Innovative Programs), and
- Title V-D-6 (Gifted and Talented Students).

All of these programs, except Title I-A, Title V-A, and Title V-D-6, are governed by equitable participation requirements included in Title IX-E-1 (Sections 9501-9506). Neither the Reading First program nor the Innovative Programs (Title V-A) is currently funded. In addition, funds are no longer provided for the state grant portion of the Safe and Drug-Free Schools and Communities program, which was subject to equitable participation provisions.

In addition to statutory language addressing the equitable participation of private school students in ESEA program, the U.S. Department of Education (ED) has issued regulations<sup>68</sup> and non-regulatory guidance<sup>69</sup> regarding the Section 9501 provisions, as well as the equitable participation requirements that pertain specifically to Title I-A.<sup>70</sup> Non-regulatory guidance was also produced on the provision of services under Title V-A.<sup>71</sup>

The discussion in this report of equitable participation requirements under Section 9501 and under Title I-A is based on statutory requirements and the aforementioned regulations and non-regulatory guidance promulgated by ED. The first section of the discussion focuses on the equitable participation requirements under Section 9501. This is followed by a discussion of the equitable participation provisions that specifically apply to Title I-A. The equitable participation requirements that apply specifically to Title V-A and to Title V-D-6 are not discussed.<sup>72</sup> The section concludes with a brief examination of other provisions included in the ESEA that do not apply to private schools based on funds provided through equitable participation requirements.

## Title IX-E-1 Requirements

Section 9501 of the ESEA requires that local educational agencies (LEAs) (or other grantees under relevant programs) shall “after timely and meaningful consultation with appropriate private school officials provide to those children and their teachers or other educational personnel, on an equitable basis, special educational services or other benefits that address their needs under the program.” In addition, all services, benefits, material, and equipment provided must be secular, neutral, and nonideological. The services provided must be equitable in comparison to services provided to public school students and staff. These services must be provided in a timely manner. The expenditures for private school students must be equal to those for public school students,

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<sup>68</sup> 34 CFR §§ 200.64-200.67.

<sup>69</sup> U.S. Department of Education, Office of Innovation and Improvement, Office of Non-Public Education, *Equitable Services to Eligible Private School Students, Teachers, and Other Educational Personnel: Non-Regulatory Guidance*, August 2005, and U.S. Department of Education, Office of Innovation and Improvement, Office of Non-Public Education, *Title IX, Part E Uniform Provisions Subpart I—Private Schools: Equitable Services for Eligible Private School Students, Teachers, and Other Educational Personnel*, Non-Regulatory Guidance, Washington, DC, March 2009, <http://www.ed.gov/policy/elsec/guid/edpicks.jhtml?src=ln>.

<sup>70</sup> U.S. Department of Education, Office of Innovation and Improvement, Office of Non-Public Education, *Title I Services to Private School Children: Non-Regulatory Guidance*, October 17, 2003.

<sup>71</sup> U.S. Department of Education, Office of Innovation and Improvement, *Guidance for Title V, Part A of the Elementary and Secondary Education Act*, as reauthorized by the No Child Left Behind (NCLB) Act (State Grants for Innovative Programs), August 2002.

<sup>72</sup> Requirements related to Title V-A are not discussed, as this program has not been funded since FY2007. The requirements related to the Gifted and Talented Program are substantially less detailed those under Section 9501 and Title I-A. They provide for the participation of private school student and teachers in the program’s general provisions. Under the Gifted and Talented Program, the Secretary is required to ensure, where appropriate, that equitable services are provided to private school students and staff.

taking into account the number and educational needs of the children to be served. The services for private school students and staff may be provided directly by the LEA or through contracts with third-party public or private organizations.<sup>73</sup>

Private school students enrolled in nonprofit elementary and secondary schools, including religiously affiliated schools, located in the LEA are eligible to receive services.<sup>74</sup> However, if an ESEA program restricts eligibility for a program to a specific group of students (e.g., limited English proficient students), the same restrictions apply to the private school students to be served. The LEA responsible for providing equitable services is determined based on the location of the school in which the student is enrolled, rather than on where the student lives.<sup>75</sup>

## **Consultation**

For purposes of determining which services will be provided to private school students, consultation involves communication between LEAs and private school officials on relevant issues related to equitable participation. The LEA is obligated to start the consultation process with school officials representing all private schools located within its boundaries. Consultation must occur before the LEA makes any decision that affects opportunities for equitable participation. The consultation requirement cannot be met by LEAs solely on the basis of offering to provide services. The LEAs are required to discuss the provision of the services and the needs of private school students and teachers, and must have input from private school officials regarding these issues. As previously discussed, consultation must be both meaningful and timely. “Meaningful” means that all required topics (e.g., how needs will be identified; what services will be offered; how, where, and by whom services will be provided; how services will be assessed; size and scope of equitable services; and when the LEA will make decisions about service delivery) are discussed. Timely consultation requires that advance notice be given to private school officials regarding the start of the consultation process and that the process must begin with sufficient time for services to be provided at the start of the school year.

## **Expenditures**

Expenditures for equitable services to private school students and staff must be equal to the expenditures for the public school program, taking into account the number and educational needs of the children to be served. These determinations are often made on the basis of the relative enrollments of public and private school students. Calculations based on relative enrollments, however, assume that these numbers accurately reflect the needs of students and teachers in public and private schools. LEAs may also use another factor such as poverty in making expenditure decisions, but the decision cannot be based solely on poverty because both educational need and number of students must be taken into account. LEAs should consult with private school officials regarding the methodology used to determine expenditures. Only the LEA may obligate and expend federal education funds on behalf of private school students and staff.

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<sup>73</sup> If services are delivered by a third party, the service provider must be under the control and supervision of the LEA and must be independent of the private school and any religious organization. A private school teacher may be hired to provide services in his or her own school, as long as the teacher is independent of the private school and under the supervision of the LEA during the time at which the services are provided.

<sup>74</sup> Home-school students are eligible to receive services if home schools are considered private schools under state law.

<sup>75</sup> Students with disabilities who are enrolled in a private school by their LEA of residence for the purpose of receiving a free appropriate public education are eligible to receive equitable services under the programs covered by Section 9501 of the ESEA. The LEA in which the private school is located is responsible for providing these equitable services.



The control of program funds and ownership of any materials purchased with those funds rests with the LEA.

Participation in a program by public school and private school students and staff is generally considered to be equitable if the following conditions are met:

- The LEA spends an equal amount of funds to serve similar public and private school students and staff, taking into account the number and educational needs of those students and staff.
- The LEA provides services and benefits to private school students and staff that are equitable in comparison to the services and benefits provided to public school students and staff.
- The LEA assesses and addresses student and staff needs on a comparable basis.
- The LEA provides, in the aggregate, approximately the same amount of services to public school students and staff as it does for private school students and staff.
- The LEA provides both groups with equal opportunities to participate in program activities.
- The LEA provides private school students and staff with an opportunity to participate in services that provide reasonable promise for participating students to meet academic standards.
- The LEA provides different benefits to private schools students and teachers if their needs are different than those of public school students and staff. While services may differ, they must be allowable services under the particular ESEA program for which services are being provided.

### **Complaint Resolution and Bypass Procedures (Sections 9502-9504)**

There is a statutorily mandated system in place for addressing the concerns of private school officials if they feel that timely and meaningful consultation has not occurred. The process requires the complaint to first be addressed with the LEA. If satisfactory resolution of the issue is not obtained, the complaint must be addressed with the state educational agency (SEA) first informally and, if satisfactory resolution is not achieved, subsequently through a formal written complaint. If the complaint is still not resolved after formally addressing the complaint with the SEA, the private school officials may appeal directly to the Secretary of Education (hereafter referred to as the Secretary). There is also a formal bypass system by which the Secretary provides equitable services directly to private school students and staff through a third-party provider in instances where equitable services are not provided to eligible private school students—either because of state constitutional prohibitions or the failure of LEAs to comply.<sup>76</sup> Bypass arrangements for certain ESEA programs have been used in Missouri and Virginia.<sup>77</sup>

### **Additional Provisions (Section 9506)**

Related to the issue of equitable participation, Section 9506 states that nothing in the ESEA shall be construed to “permit, allow, encourage, or authorize any federal control over any aspect of any

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<sup>76</sup> See ESEA Sections 1120(e), 1307, 5142(i), and 9502. Also see part H of U.S. Department of Education, Office of Innovation and Improvement, Office of Non-Public Education, *Title IX, Part E Uniform Provisions Subpart 1—Private Schools: Equitable Services for Eligible Private School Students, Teachers, and Other Education Personnel*, Non-Regulatory Guidance, Washington, DC, March 2009, <http://www.ed.gov/policy/elsec/guid/edpicks.jhtml?src=ln>.

<sup>77</sup> For more information, see 64 *Federal Register* 30186-30188, June 4, 1999.

private, religious, or home school.” Further, statutory language states that private schools that do not receive funds or services under the ESEA and students who attend private schools that do not receive funds or services under the ESEA can be required to participate in any assessments required under ESEA, including state academic assessments of reading and mathematics. In addition, statutory language specifically states that nothing in the ESEA should be constructed to require any SEA or LEA receiving ESEA funds to “mandate, direct, or control the curriculum” of a private or home school.

## **Title I-A Equitable Participation Requirements**

In many ways, the equitable participation requirements under Title I-A are similar to those under Section 9501. Under Title I-A, after timely and meaningful consultation with private school officials, LEAs are required to provide eligible children, on an equitable basis, services and other benefits under Title I-A that address their needs, and must ensure that teachers and families of the children participate on an equitable basis in services and activities related to parent involvement (Section 1118)<sup>78</sup> and professional development (Section 1119).<sup>79</sup> Similar to the requirements of Section 9501, the services, benefits, materials, and equipment provided must be secular, neutral, and nonideological. Equitable services must be provided in a timely manner and may be provided through a third-party contractor. The control of public funds and materials purchased with those funds must remain with a public agency. There is also a similar complaint process and bypass provisions. The consultation process differs slightly in that consultation must also include a discussion of parental involvement and professional development. In addition, there must be written confirmation that consultation has occurred.

An area where the Title I-A provisions differ substantially from those for other ESEA programs is with respect to which private school students are eligible for services. Private school students must reside (as opposed to attend a private school) in a participating public school attendance area<sup>80</sup> to be eligible for services provided under Title I-A. That is, the LEA in which the student resides is responsible for providing services to the child, even if the student attends a private school in another LEA.<sup>81</sup> For purposes of allocating funds for equitable services to students enrolled in private schools, LEAs are required to discuss with private school officials the method or data sources that will be used to determine the number of private school children from low-income families that reside in each school attendance area of the LEA. An LEA, in consultation with private schools, must obtain the best available poverty data on private school students residing in public school attendance areas.<sup>82</sup> Based on the total number of children from low-

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<sup>78</sup> If an LEA reserves funds from its allocation for Section 1118, it must provide for the equitable participation of parent involvement activities in private schools. This can be determined based on the proportion of private school students from low-income families residing in the public school attendance area relative to all students from low-income families residing in the public school attendance area.

<sup>79</sup> If an LEA reserves funds from its allocation for Section 1119, it must provide for the equitable participation in professional development activities in private schools. This can be determined based on the proportion of private school students from low-income families residing in the public school attendance area relative to all students from low-income families residing in the public school attendance area.

<sup>80</sup> An eligible public school attendance area (generally a school) is identified by an LEA based on poverty data used to determine which school attendance areas will receive Title I-A funds. For more information on how LEAs make this determine, see CRS Report R40672, *Education for the Disadvantaged: Analysis of Issues for the ESEA Title I-A Allocation Formulas*, by Rebecca R. Skinner, p. 19.

<sup>81</sup> If this is the case, the LEA responsible for the child can choose to reimburse the LEA in which the private school is located for the provision of services rather than providing the services itself.

<sup>82</sup> When determining which schools to serve under Title I-A, an LEA should attempt to consider data on the number of

income families residing in each attendance area who attend either public or private schools, the LEA calculates the total amount of funds available for each area. The amount reserved for equitable participation is determined by multiplying the per-pupil allocation for the LEA under Title I-A by the number of low-income private school students in the attendance area.<sup>83</sup>

In general, under Title I-A, the amount of funds provided to LEAs is determined primarily on the number of low-income children residing in the LEA.<sup>84</sup> The amount of funds provided to individual schools is subsequently determined based on the number of low-income children enrolled in the school or residing in applicable school attendance areas. Once it is determined which schools will receive funds, services are provided to the lowest achieving students enrolled in those schools, regardless of family income. Thus, for private school students to receive services, a student must reside in a participating public school attendance area for purposes of Title I-A and the student must be identified by the private school as failing, or most at risk of failing, to meet academic achievement standards on the basis of “multiple, educationally related, objective criteria.” In determining these criteria, the LEA must consult with private school officials. Private school students served under Title I-A must be held to high academic standards. LEA and private school officials must consult on what constitutes annual progress for students served under the Title I-A program. For example, they must consult about the use of a state assessment or an alternative assessment to gauge student progress. It may not be appropriate, however, to expect private school students to meet state standards, especially if the private school’s curriculum is not aligned with the standards. The LEA must modify the program for private school students if expected annual progress, based on the agreed upon measure, is not made.

## **Other Relevant Provisions in the ESEA**

In addition to the aforementioned requirements and restrictions, the requirements under Title I-A of the ESEA related to state academic standards, adequate yearly progress (AYP) determinations, and highly qualified teachers do not apply to private schools based on funds provided through equitable services.<sup>85</sup> Further, private schools are not subject to military recruiter requirements or

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children from low-income families who attend either public or private schools. However, to do this, the LEA must have data for all school attendance areas. Thus, it may be necessary to make decisions regarding Title I-A funds based on the number of low-income children in public schools only. An LEA can also determine the number of children from low-income families for private schools using a measure for which comparable data are also available from public schools. For example, an LEA could use comparable data from a survey (and can extrapolate if necessary), comparable data from a different source, proportionality (e.g., if the poverty rate is 60% for public school students and a private school has 50 students, 60% of the 50 students would be considered low income), or an equated measure (i.e., a proportional relationship between two sources of data on public school children and applying the same ratio to a known source of data for private school).

<sup>83</sup> Prior to determining the per-pupil allocation, an LEA may reserve funds for neglected and delinquent children, parent involvement, professional development, public school choice, supplemental educational services, administration, and special capital expenses. The LEA may also reserve funds for school improvement activities or districtwide instructional programs. Equitable participation requirements apply to funds reserved “off-the-top” for districtwide instructional programs.

<sup>84</sup> For more information about the determination of Title I-A grants to LEAs, see CRS Report R40672, *Education for the Disadvantaged: Analysis of Issues for the ESEA Title I-A Allocation Formulas*, by Rebecca R. Skinner.

<sup>85</sup> For more information on academic standards and AYP, see CRS Report RL33371, *K-12 Education: Implementation Status of the No Child Left Behind Act of 2001 (P.L. 107-110)*, coordinated by Gail McCallion. For more information about highly qualified teachers, see CRS Report RL33333, *A Highly Qualified Teacher in Every Classroom: Implementation of the No Child Left Behind Act and Reauthorization Issues for the 111<sup>th</sup> Congress*, by Jeffrey J. Kuenzi.

Family Educational Rights Privacy Act (FERPA) requirements based on funds provided through equitable services.

## Supplemental Educational Services and Faith-Based Providers

In addition to providing funds for disadvantaged students, Title I-A of the ESEA contains numerous accountability requirements with which schools and LEAs in states that accept Title I-A funds must comply.<sup>86</sup> Each state's accountability system must be based on the academic assessments and other academic indicators it uses to measure academic progress. LEAs are required to annually review the status of each public school in making adequate yearly progress toward state standards of academic achievement; and SEAs are required to annually review the status of each LEA in making AYP.

When schools receiving Title I-A funds do not make AYP for two or more consecutive years, they become subject to a range of increasingly severe sanctions, including the requirement to provide supplemental educational services, which are coupled with technical assistance provided by the LEA.<sup>87</sup> After not making AYP for two consecutive years, a Title I-A school is identified for school improvement. Being designated for school improvement carries with it the requirement to develop or revise a school plan designed to result in the improvement of the school and use at least 10% of their Title I-A funding for professional development. All students attending Title I-A schools identified for school improvement also must be offered public school choice—the opportunity to transfer to another public school within the same LEA.<sup>88</sup> LEAs are required to provide students who transfer to different schools with transportation and must give priority in choosing schools to the lowest-achieving children from low-income families.

If, after being identified for school improvement, a school does not make AYP for another year, it must be identified for a second year of school improvement by the end of that school year.<sup>89</sup> All students attending a school identified for a second year of school improvement must continue to be offered the option of attending another eligible public school within the same LEA. In addition, students from low-income families who continue to attend the school must be offered the opportunity to receive supplemental educational services.<sup>90</sup> Supplemental educational services are educational activities, such as tutoring, that are provided outside of normal school hours and which are designed to augment or enhance the educational services provided during regular periods of instruction. Supplemental educational services may be provided by a non-profit entity, a for-profit entity, or the LEA, unless such services are determined by the SEA to be unavailable in the local area.<sup>91</sup>

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<sup>86</sup> Currently, all states receive Title I-A funds.

<sup>87</sup> For more information about school improvement requirements, see CRS Report RL33371, *K-12 Education: Implementation Status of the No Child Left Behind Act of 2001 (P.L. 107-110)*, coordinated by Gail McCallion.

<sup>88</sup> For further information on public school choice, see CRS Report RL33506, *School Choice Under the ESEA: Programs and Requirements*, by David P. Smole.

<sup>89</sup> A school exits school improvement status by making AYP for two consecutive years.

<sup>90</sup> For further information on supplemental educational services, see CRS Report RL31329, *Supplemental Educational Services for Children from Low-Income Families Under ESEA Title I-A*, by David P. Smole.

<sup>91</sup> Schools identified for improvement, corrective action, or restructuring, and LEAs identified for improvement or corrective action, lose their eligibility to supplemental educational services providers.

Students from low-income families who attend schools identified for improvement are eligible to receive SES which could be provided by faith-based organizations (FBOs). FBOs, including private schools, are eligible to provide SES on the same basis as any other private entity, provided the FBO meets applicable statutory and regulatory requirements.<sup>92</sup> An SEA is prohibited from discriminating against potential SES providers based on the provider's religious affiliation. Conversely, an FBO providing SES may not discriminate against students based on their religious affiliations. By becoming an SES provider, FBOs do not have to give up their "independence, autonomy, right of expression, religious character, and authority over its governance."<sup>93</sup> FBOs are prohibited, however, from using Title I-A funds or other federal funds to support religious practices.

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<sup>92</sup> U.S. Department of Education, *Supplemental Educational Services: Non-Regulatory Guidance*, January 14, 2009, <http://www2.ed.gov/policy/elsec/guid/suppsvcsguid.pdf>. See item C-5.

<sup>93</sup> See footnote 92.